DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

VICTORIA STROUSE, an individual Petitioner, vs. CORNER OF THE SKY, INC., a California corporation, d/b/a CORNER OF THE SKY ENTERTAINMENT, INC., Respondents.	Case No. TAC 13-00 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on May 15, 2000, by VICTORIA STROUSE, (hereinafter "Petitioner" or Strouse), alleging that CORNER OF THE SKY, INC., dba CORNER OF THE SKY ENTERTAINMENT INC., (hereinafter "Respondent"), acted as an unlicenced talent agent in violation of Labor Code §1700.5[1]. The petitioner seeks a determination voiding *ab initio* the 1996 oral and subsequent written management agreement between the parties.

Respondent filed his answer on June 19, 2000. A hearing

[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

was scheduled and commenced in the Los Angeles office of the Labor Commissioner on October 6, 2000. Petitioner was represented by Matthew H. Schwartz of Green & Schwartz, LLP; respondent appeared through his attorney Jay M. Spillane of Fox & Spillane LLP. Due consideration having been given to the testimony, documentary evidence, briefs and arguments presented, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. Respondent, once a literary talent agent for the William Morris Agency, opted for a career change and in 1996 became a literary manager. In October of 1996, the parties entered into an oral contract whereby respondent would manage petitioner's career as a motion picture screenwriter. According to the respondent, managing petitioner's career included, *inter alia*, reviewing her work, advising her as to which works were marketable, utilizing his "connections" to obtain a licensed talent agent and "shopping" her screenplays for the ultimate goal of selling petitioner's product.

2. During 1997, respondent focused on selling two completed screenplays, titled "Chick Flick" eventually renamed "Just Like a Woman" and "Mary Jane's Last Dance". In an effort to sell the screenplays, respondent admittedly, "sent the transcript [`Chick Flick'] to everyone [he] knew." Included in those submissions were various producers from Disney, Touchstone Pictures, New Line Cinema, and Fox Studios. Respondent conducted these activities ostensibly in the same manner as he did while working as a literary agent for the William Morris Agency.

3. Respondent testified in great length about the motion picture industry's two-tiered screenplay purchasing process. He stated that in his experience, if a producer showed interest in a shopped screenplay, the producer would then ask a studio to option or purchase the script. Accordingly, it was the studio who made the final purchasing decision. Occasionally, respondent would send petitioner's screenplays directly to a studio if requested to do so by a producer. The focus of respondent's argument was that if a producer had shown interest and a studio optioned the screenplay, it was his intent to bring in a licensed talent agent to negotiate the terms of the deal. Neither of these prerequisites occurred with petitioner's work throughout 1997.

4. On March 4, 1998, the parties memorialized the prior verbal agreement in a writing, purporting to back date the written agreement from October 15, 1996, through October 14, 1998. In early 1998, respondent secured a literary talent agent from the William Morris Agency to represent and assist the petitioner in selling her screenplays. In April of 1998, respondent went back to his former occupation as a literary talent agent for Innovative Artists.

5. In May of 1998, petitioner's new talent agent sold "Mary Jane's Last Dance" and in early 1999 "Just Like a Woman" was similarly optioned. Respondent was not involved in the negotiation of either project and consequently the petitioner failed to pay respondent's commissions allegedly owed for both projects. Respondent then filed a breach of contract lawsuit, case no. BC217761 in Los Angeles Superior Court. The superior court action was stayed pending the results of this petition.

CONCLUSIONS OF LAW

1. The primary issue is whether the respondent operated as a "talent agency" within the meaning of §1700.4(a). Labor Code §1700.4(a) defines "talent agency" as, "a person or corporation who engages in the occupation of procuring, offering, promising, or **attempting to procure employment or engagements** for an artist or artists."

2. Labor Code §1700.4(b) includes "writers" of motion pictures in the definition of "artist" and petitioner is therefore an "artist" within the meaning of §1700.4(b).

3. Respondent's argument is twofold. First, respondent argues sending screenplays to producers or sending screenplays directly to studios, does not constitute "**attempting** to procure employment". Respondent reasons that, "the term `attempt' should be construed as action taken with the intent to negotiate, or resulting in actual negotiation." Respondent maintains that he always intended to bring in a licensed talent agent to negotiate the terms if negotiations ensued, and that sending screenplays to potential producers and/or buyers (studios) was a "courtesy to and [only] at the request of producers[2]." Respondent's analysis is

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[2] A great deal of testimony was offered to suggest that the two-tiered purchasing system is standard in the industry and that by respondent sending transcripts primarily to producers and not studios, this negated any intent to deal with actual prospective buyers. As a result respondent was not actually attempting to sell the product. Respondent's argument that this is not "**attempting** to procure" is nonsensical. Respondent intended to seek a buyer in the only way the system allowed; producer first and studio second. A hierarchy of purchasing is insignificant in determining respondent's intent and does not shield the respondent from the literal definition of "attempt", "the act or an instance of attempting; an unsuccessful effort" *Merriam Webster 10th Edition*

flawed. To accept Respondent's interpretation of "attempt to procure" would require the Labor Commissioner to be a mind reader or own a crystal ball. As here, if there was no actual deal, nor evidence of past conduct, it is impossible for the Labor Commissioner to determine whether the respondent would bring in a licensed talent agent to negotiate the terms of the deal. Even assuming that he did, this would not exempt the respondent from requiring a license[3]. To hold that a manager may solicit for the purchase of a screenplay and then subsequently hire a licensed talent agent to negotiate the terms of the deal would essentially amend 1700.44(d). That is solely for the legislature.

4. Second, and far more interesting, is respondent's argument that attempting to sell a completed screenplay would not constitute an "attempt to procure **employment**" within the meaning of 1700.4(a). Respondent reasons that selling a completed screenplay is essentially selling services that have already been rendered and therefore "does not involve employment", as any reasonable interpretation of employment manifests an intent of the employer to seek future services.

5. In support of respondent's proposition, he cites Davenport v. AFH Talent Agency, TAC 43-94. In Davenport, the petitioner was a writer of a novel which the respondent sold to a book publisher[4]. Our case is markedly different. Here, petitioner

[3] Labor Code §1700.44(d) states, "it is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment contract." The statute requires the manager to act at the request of a licensed talent agent, not the inverse.

[4] In Davenport, the hearing officer held that, "obviously, the activities of procuring or offering to procure employment in the entertainment industry is what requires a license. A literary agent is a person who represents authors in

is distinguished in that she is a writer of motion picture screenplays. Labor Code §1700.4(b) defines "artists" as:

> actors and actresses rendering services on the legitimate stage and in the production of motion pictures, . . . , writers, cinematographers, . . . ,and other artists rendering professional services in the motion picture, theatrical, radio, television and other entertainment enterprises."

6. The petitioner in Davenport was not rendering services in the production of motion pictures or television and consequently the respondent was not representing an "artist" within the meaning of 1700.4(b). Here, Strouse writes screenplays to be adapted for motion pictures and clearly is an "artist" within the meaning of the Talent Agencies Act. In Davenport, the hearing officer simply did not address the issue of whether the attempt to sell a completed screenplay qualified as an attempt to procure employment in the entertainment industry. The analysis in Davenport is fact specific and its holding is limited to the sale of a completed novel. The Labor Commissioner has historically held that the sale of a novel, not intended for television or motion pictures, does not fall within the purview of the Labor Commissioner's jurisdiction because the author of a novel is not an artist within the meaning of 1700.4(b) and consequently, the holding in Davenport is neither affected, nor particularly instructive here.

7. Assuming, *arguendo*, the attempted sale of a completed work without contemplation of future services is not an

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the sale of their works to publishers ... The respondent simply sold the Petitioner's book: a finished product." The case was dismissed on jurisdictional grounds.

attempt to procure employment; the narrower issue becomes whether the attempted sale of petitioner's completed screenplay would have included, discussions about or negotiations for petitioner's future services. If so, the attempted sale of petitioner's screenplay would be construed an "attempt to procure employment." Petitioner introduced a declaration, stating, "key points ... that [are] raised in **every** negotiation for the purchase of a motion picture screenplay is whether the screen writer who wrote the material to be purchased by the acquiring party will be employed in the future to perform either a "rewrite"[5] or a "polish"[6] on this material." The declaration was timely objected to on hearsay grounds[7]. However, this declaration buttressed by the parties testimony established that the purchase of a motion picture screenplay invariably includes discussions and/or negotiations regarding "rewrites" or "polishes".

8. Additionally, petitioner sold her screenplays and in both proposals she was contracted to and did render future services in the form of "rewrites" and/or "polishes." A holding exempting unsuccessful solicitations for the sale of a screenplay from the protective mechanisms of the Act, simply because we are unable to determine whether future services were contemplated would create an unprotected avenue through the heart of the Talent Agencies Act.

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[5] "According to the Writer's Guild of America, a 'rewrite' is the writing of significant changes in plot, story line or interrelationships of characters in a screenplay."

[6] "According to the Writer's Guild of America, a 'polish' is the writing of changes to dialogue, narration and/or action, but not including a rewrite."

[7] Cal. Code of Regulations §12031 states, "the Labor Commissioner is not bound by the rules of evidence or judicial procedure."

The likelihood of future services from the artist after the sale of a screenplay is so overwhelming, that an unsuccessful attempt to sell a completed screenplay shall be considered an attempt to procure employment. The Act is a remedial statute ... [and is] designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision . . . Such statutes are enacted for the protection of those seeking employment [i.e., the artists]. Consequently, the Act should be liberally construed to promote the general object sought to be accomplished. To ensure the personal, professional, and financial welfare of artists. Waisbren v. Peppercorn, 41 Cal.App.4th 246 at 254. Clearly, the Labor Commissioner cannot allow literary managers to solicit for sale artists' scripts and screenplays and allow that activity to be devoid of regulation, unless the product is sold and future services rendered. This would create a standard that would be both arbitrary and unenforceable.

9. In short, the shopping, or unsuccessful efforts to sell, completed screenplays and scripts to producers and studios in the television and motion picture industries, absent compelling evidence that no future services of the artist are contemplated, establishes an attempt to procure employment within the meaning of 1700.4(a) and consequently is protected activity.

10. Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

11. In Waisbren v. Peppercorn Production, Inc. (1995)

41 Cal.App.4th 246, the court held that any single act of procurement efforts subjects the agent to the Talent Agencies Act's licensing requirements, thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of §1700.4(a).

12. Waisbren adds, "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicenced [agent] and an artist is void." Waisbren, supra, 41 Cal.App.4th 246 at p. 261; Buchwald v. Superior Court, 254 Cal.App.2d 347 at p. 351.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1996 oral contract and 1998 subsequent written extension between petitioner VICTORIA STROUSE, and respondent CORNER OF THE SKY, INC., dba CORNER OF THE SKY ENTERTAINMENT, INC., is unlawful and void *ab initio*. Respondent has no enforceable rights under that contract.

Having made no showing that the respondent collected commissions within the one-year statute of limitations prescribed by Labor Code §1700.44(c), petitioner is not entitled to a monetary recovery.

Dated: 2-28-01

David L. Gurley
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: FEB 27 2001

THOMAS GROGAN
Chief Deputy Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

VICTORIA STROUSE, AN INDIVIDUAL VS. CORNER OF THE SKY, INC. A CALIFORNIA CORPORATION, DBA CORNER OF THE SKY ENTERTAINMENT INC.
SF 013-00 TAC 13-00

I, Benjamin Chang, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On March 1, 2001, I served the following document:

DETERMINATION OF CONTROVERSY

by facsimile and by placing a true copy thereof in envelope(s)addressed as follows:

MATTHEW H. SCHWARTZ
GREEN & SCHWARTZ, LLP
1875 CENTURY PARK EAST, STE 1240
LOS ANGELES, CA 90067

JAY M. SPILLANE
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and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first-class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on March 1, 2001, at San Francisco, California.

BENJAMIN CHANG